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In The

Supreme Court of the United States

OCTOBER TERM, 1985

BHARATI DESAI,

Petitioner,

vs.

TOMPKINS COUNTY TRUST COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the record in this case establishes that the Second Circuit improperly applied the clearly erroneous standard of review under Rule 52(a) of the Federal Rules of Civil Procedure.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent respectfully requests that this Court deny the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioner commenced this action against her former employer, Tompkins County Trust Company (hereinafter "TCTC")[1], in United States District Court for the Northern District of New York pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* The complaint alleged that TCTC discriminated against petitioner by failing to give her a job promotion. Petitioner further alleged that TCTC terminated her employment in retaliation for her protestations concerning alleged discriminatory treatment. A third claim,

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[1] Pursuant to U.S. Sup. Ct. Rule 28.1, TCTC has no parent companies, subsidiaries or affiliates.

based upon an alleged breach of contract, was dismissed prior to trial and is not involved in this application.

On March 7, 8 and 9, 1984, the case was tried by the District Court (Hon. Neal P. McCurn, Justice Presiding), which rendered its judgment and order dismissing petitioner's complaint on March 26, 1984. The judgment was duly entered on April 4, 1984. The District Court determined that TCTC's decisions to deny petitioner a promotion and, ultimately, to terminate her employment were based on her poor work habits and job performance, not on her national origin. Accordingly, the District Court concluded that TCTC had not discriminated against petitioner in violation of Title VII.

On April 18, 1984, petitioner moved for a new trial pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. On April 19, 1984, petitioner filed a notice of appeal with respect to the judgment entered on April 4, 1984. On May 8, 1984, the District Court denied the motion for a new trial as untimely under Rule 59(b) of the Federal Rules of Civil Procedure.

The Court of Appeals affirmed the District Court in all respects in an unpublished decision.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS IN CONFORMITY WITH DECISIONS OF THIS COURT.

In adopting the District Court's findings of fact and conclusions of law, the Court of Appeals properly applied and followed the decisions of this Court. Petitioner contends that the Court of Appeals' decision is inconsistent with decisions of this Court and of other Circuit Courts of Appeals. In her effort to demonstrate inconsistency, petitioner argues that the Court of Appeals misconstrued the "clearly erroneous" standard of review under Rule 52(a) of the Federal Rules of Civil Procedure. This claim is to-

tally devoid of factual and legal support. Initially, the unpublished statement of decision by the Court of Appeals lacks precedential value and, in any event, cannot give rise to any inconsistency. Further, the decision is silent concerning the manner in which the Court of Appeals applied the clearly erroneous standard. Thus, petitioner's assertion that the Court of Appeals misconstrued the clearly erroneous standard is pure speculation.

Even assuming that the Court of Appeals applied the clearly erroneous standard to its review of the District Court's ultimate finding on the issue of discrimination *vel non,* it acted in conformity with this Court's recent decisions. This precise issue was considered in *Pullman-Standard v. Swint,* 456 U.S. 273, 290 (1982), where this Court held that a district court's factual finding on the issue of discriminatory intent is subject to the clearly erroneous standard of review under Rule 52(a). Here, as in *Pullman-Standard,* the factual inquiry was whether intentional discrimination had occurred. Thus, the Court of Appeals' summary affirmance was entirely consistent with this Court's prior decisions.

II. THERE IS NO INTRACIRCUIT CONFLICT.

The Court of Appeals' decision denying remand on petitioner's motion for a new trial is not in conflict with *Jenkins v. Chemical Bank,* 721 F.2d 876 (2d Cir. 1983). Unlike the present case, *Jenkins* involved a pretrial request for assigned counsel on the ground of inability to afford private counsel. *Jenkins* did not even involve a motion pursuant to Rule 59(a) of the Federal Rules of Civil Procedure and, therefore, cannot be considered as establishing any procedure within the Second Circuit for determining such motions.

Nor does *Weiss v. Hunna,* 312 F.2d 711 (2d Cir. 1963) establish such a procedure. In *Weiss,* the District Court elected to treat an untimely Rule 59(a) motion as a motion under Rule 60(b). The

District Court denied the motion, but its order was jurisdictionally defective because a notice of appeal had been filed. The Court of Appeals treated the *pro se* appeal as a motion to remand but, relying on the District Court's opinion, denied the motion.

Neither *Jenkins* nor *Weiss* establishes a remand procedure which requires an untimely Rule 59(a) motion to be treated as a motion under Rule 60(b). Moreover, petitioner has demonstrated no factual basis that would justify remand. Petitioner argues that remand should have been granted so that the District Court could have considered her claim of inadequacy of counsel. Such action by the Court of Appeals would be particularly inappropriate in view of the District Court's observation that "for the record [petitioner's counsel] very adequately represented [petitioner]". (Petition App., C-6)

III. THIS CASE INVOLVES NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.

Petitioner has failed to demonstrate that this case will have any significant effect upon persons other than the parties to this case or that the circumstances herein are likely to reoccur. Her remaining contentions merely relate to the sufficiency of her proof. Specifically, she argues that the District Court should have concluded that her discharge, though not retaliatory, was discriminatory. There was no basis for the District Court to reach this conclusion, particularly in view of its finding that petitioner's "inability to get along with her co-workers, unwillingness to accept authority, language difficulties, abruptness, slowness and body odor prompted her termination on October 19." (Petition App., B-10)

Nor did the District Court substitute its own theory in concluding that TCTC did not discriminate against petitioner. Although TCTC claimed at trial that another employee had previously been designated for the position which petitioner sought, it also

argued, in the alternative, that petitioner was not qualified for the position, even if it was available. (Petition App., J-2 - J-3)

Accordingly, this case does not merit review by this Court.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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